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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-1429

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC., MILLIKEN & COMPANY, ARKWRIGHT MILLS, SPARTAN MILLS, BLAIR MILLS, INC., HERMITAGE, INC., DAN RIVER, INC., CONE MILLS CORPORATION, MAYFAIR MILLS, SPRINGS MILLS, INC., RIEGEL TEXTILE CORPORATION, FIELDCREST MILLS, INC., AND WEST POINT-PEPPERELL, INC.,

Petitioners,

v.

RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROBERT H. BORK
142 Huntington Street
New Haven, Connecticut 06511
Counsel for American Textile Manufacturers Institute, Inc.

GREGORY B. TOBIN
OGLETREE, DEAKINS, SMOAK, STEWART & EDWARDS
3920 First National Bank Tower
Atlanta, Georgia 30303
Counsel for American Textile Manufacturers Institute, Inc.

JOHN S. BATTLE, JR.
ROBERT E. PAYNE
THOMAS W. MCCANDLISH
McGuire, Woods & Battle
1400 Ross Building
Richmond, Virginia 23219
Counsel for American Textile Manufacturers Institute, Inc.
and for
Fieldcrest Mills, Inc.

(Counsel list continued on inside cover)

ROBERT T. THOMPSON
GARY S. KLEIN
Thompson, Mann & Hutson
The Daniel Building—Suite 2222
Greenville, S. C. 29602
Counsel for Milliken and Company

THOMAS A. EVINS
CLYDE H. HAMILTON
Butler, Means, Evins & Browne
P. O. Box 451
Spartanburg, S. C. 29304
Counsel for Arkwright Mills

JOSEPH K. MADDOX, JR.
P. O. Box 5784
Spartanburg, S. C. 29304
Counsel for Spartan Mills

ROBERT T. THOMPSON
GARY S. KLEIN
Thompson, Mann & Hutson
The Daniel Building—Suite 2222
Greenville, S. C. 29602
Counsel for Blair Mills, Inc.

ROBERT T. THOMPSON
GARY S. KLEIN
Thompson, Mann & Hutson
The Daniel Building—Suite 2222
Greenville, S. C. 29602
Counsel for Hermitage, Inc.

ROGER L. TUTTLE
2291 Memorial Drive
Danville, Virginia 24541
Counsel for Dan River, Inc.

SAMUEL K. ABRAMS
BRIAN E. MORAN
Baker & Hostetler
1776 K Street, N.W.
Suite 900
Washington, D. C. 20006
Counsel for Cone Mills Corporation

H. J. ELAM, III
NEIL W. KOONCE
Cone Mills Corporation
1201 Maple Street
Greensboro, N. C. 27405
Counsel for Cone Mills Corporation

THOMAS A. EVINS
CLYDE H. HAMILTON
Butler, Means, Evins & Browne
P. O. Box 451
Spartanburg, S. C. 29304
Counsel for Mayfair Mills

DAN M. BYRD, JR.
J. SPRATT WHITE
P. O. Box 70
Fort Mill, S. C. 29715
Counsel for Springs Mills, Inc.

FRED M. RICHARDSON
LOVIC A. BROOKS, JR.
CHARLES A. EDWARDS
Constangy, Brooks & Smith
1900 Peachtree Center Building
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
Counsel for Riegel Textile Corporation

RICHARD H. MONK, JR.
C. POWERS DORSETT
West Point-Pepperell, Inc.
P. O. Box 71
West Point, Georgia 31833
Counsel for West Point-Pepperell, Inc.

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RAY MARSHALL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The textile industry petitioners hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.[1]

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[1] The textile industry petitioners are listed on the title page of this Petition. The United States Court of Appeals for the District of Columbia Circuit is hereafter referred to as the Court of Appeals or the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been reported.[2] The regulation in question[3] and the statement of reasons which accompanied it appear at 43 Fed. Reg. 27350-99 (June 19, 1978), as amended at 43 Fed. Reg. 28473-74 (June 30, 1978), and 43 Fed. Reg. 35032-35 (August 8, 1978), and 43 Fed. Reg. 56892-94 (December 5, 1978).

JURISDICTION

The judgment of the Court of Appeals was entered on October 24, 1979.[4] On November 7, 1979 the petitioners filed a timely petition for rehearing which was denied on January 11, 1980.[5] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and 29 U.S.C. § 660(a).

QUESTIONS PRESENTED

1. (a) Whether the Court should resolve the conflict between the District of Columbia Circuit and the Fifth, Sixth and Seventh Circuits as to the showing OSHA must make to demonstrate that its standards are economically feasible;

(b) Whether the statutory requirement that compliance with an OSHA standard must be "economically feasible" can be satisfied merely by the agency's conclusion that the standard will not put the affected industry out of business; and

(c) If the only limit on OSHA's rulemaking authority is that each standard must not by itself put the affected in-

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[2] See Slip Opinion, (App. 19-102).
[3] (App. 1-18).
[4] (App. 19-102).
[5] (App. 103). On January 22, 1980 the Court of Appeals ordered that the mandate be issued forthwith. (App. 106-107).

dustry out of business, is the Act an unconstitutional delegation of legislative power.

2. Should the Court resolve the conflict between the District of Columbia Circuit and the Fifth Circuit as to whether the Act, construed as a cohesive whole, requires OSHA to demonstrate that a standard is reasonably necessary and that there is some reasonable relationship between the benefits sought to be secured from a standard and the cost of obtaining them.

3. Whether the standard of review should continue to require a finding of substantial evidence in support of the agency's conclusions, and if so, whether the reviewing court has adequately discharged its constitutional and statutory duties when it considers only the agency's articulation of conclusions and thus relieves the agency of its duty to furnish substantial and reliable evidence in support of those conclusions.

4. Whether OSHA has the implied authority to require employers to guarantee the wages and benefits of employees who transfer to jobs warranting lower pay when the transfers result from the employees' inability to wear respirators.

STATUTES AND REGULATIONS INVOLVED

Section 6(b)(5) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(b)(5), provides:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, *to the extent feasible, on the basis of the best available evidence,* that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this sub-

> section shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, *other considerations shall be* the latest available scientific data in the field, *the feasibility of the standards,* and experience gained under this and other health and safety laws. (Emphasis added).

Section 3(8) of the Act, 29 U.S.C. § 652(8), provides:

> The term 'occupational safety and health standard' means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, *reasonably necessary or appropriate* to provide safe or healthful employment and places of employment. (Emphasis added).

Section 6(f) of the Act, 29 U.S.C. § 655(f) provides in pertinent part:

> The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

29 C.F.R. § 1910.1043 (1978)[6]

STATEMENT OF THE CASE

A. The Statutory Framework

The Occupational Safety and Health Act of 1970 (the "Act")[7] authorizes the Secretary of Labor (the "Secretary"), acting through the Occupational Safety and Health Administration (OSHA) to promulgate occupational safety and health standards. When formulating a standard under Section 6(b)(5)[8] of the Act, OSHA may lawfully require only

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[6] (App. 1-18).
[7] 29 U.S.C. § 651 *et seq.*
[8] 29 U.S.C. § 655(b)(5).

such measures which are shown to be feasible and practical.[9]

The Act does not give the Secretary unbridled discretion to promulgate standards without regard to the need for, or the cost of, the standard. Instead, OSHA is authorized to promulgate standards only if they are "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. §§ 652(8), 655.

Thus, Section 6(b)(5), taken together with Section 3(8) imposes certain limits on OSHA's authority to regulate. Indeed, the requirements that standards must be "feasible" and must respond to "material impairment" were added because some Senate proponents of occupational safety and health legislation felt that, without these limitations, OSHA's regulatory authority was too broad and not sufficiently circumscribed by practical limits.[10] Finally, Section 6(f) gives the determinations of the Secretary finality only if supported by "substantial evidence" in the underlying record.

B. The Cotton Dust Standard

Cotton dust is not a carcinogen.[11] The purported purpose of the standard for occupational exposure to cotton dust is to reduce the prevalence of byssinosis, a respiratory condition associated with exposure to cotton dust. Two basic characteristics of that condition must be remembered. First, the overwhelming majority of persons exposed to cotton dust exhibit no symptoms of byssinosis.[12] Second, for those who

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[9] Legislative History of the Occupational Safety and Health Act of 1970, 92d Congress 1st Sess. (Comm. print 1971) (herein cited as Legislative History), remarks of Senator Dominick, p. 502.

[10] Legislative History, pp. 169, 197, 242, 480.

[11] Slip Opinion, p. 18, n. 35 (App. 36).

[12] *See, e.g.*: "Byssinosis: A Study of 10133 Textile Workers," Imbus. Exhibit 6, No. 18 (App. 108); Supplement to Whitworth's statement, Exhibit 42b (App. 124); Statement of Dr. Charles F. Martin, Exhibit 46, (App. 126).

do exhibit symptoms, the condition begins as a mild, reversible one which can become chronic and irreversible only after years of additional exposure.[13]

The standard sets exposure limits for the amount of cotton dust per cubic meter of air which may permissibly be present in the workroom.[14] For the cotton textile manufacturing industry, the standard establishes permissible exposure limits of 0.2 milligrams of lint-free respirable cotton dust per cubic meter of air (0.2 mg/m^3) in "yarn manufacturing" operations. The exposure limit is 0.75 mg/m^3 in "slashing and weaving" operations. These limits are slightly higher than the concentration of microscopic particulate matter in the ambient air of the average urban and suburban area.[15]

The standard requires employers to achieve the permissible exposure limits within four years solely through the installation of engineering or work practice controls, unless the employer carries an affirmative burden of establishing that such controls are not "feasible" in his operations, in which case respirators may be used.[16] Additionally, the standard imposes numerous ancillary requirements for employee exposure monitoring, medical surveillance, work practices, respirators, training and warning signs.[17] One such provision, the wage guarantee provision, provides that employees who are unable to wear respirators may transfer jobs and that employers must continue their wages and

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[13] *See, e.g.*, Exhibit 2, 41 Fed. Reg. 56500 (1976) (App. 137), 43 Fed. Reg. 27354.

[14] 29 C.F.R. § 1910.1043(c). "Lint-free respirable cotton dust" means particles of "cotton dust" not visible to the human eye, with a diameter of approximately 15 microns or less. (App. 2).

[15] 43 Fed. Reg. 27359 (1978).

[16] 43 Fed. Reg. 27385 (1978).

[17] 29 C.F.R. § 1910.1043(d), (e), (f), (g), (h), (i), (j), (k), (l) (App. 3-17). This standard replaces one which has been in effect since 1971 and which set an exposure limit of 1.0 mg/m^3.

benefits at their previous rate even if their new job warrants a lower wage rate.[18]

OSHA promulgated the standard on June 19, 1978. Petitions for review of the standard were filed in the Fourth, Fifth, Sixth, Seventh and District of Columbia Circuits. Pursuant to 28 U.S.C. § 2112(a), all petitions were transferred to and consolidated in the District of Columbia Circuit. The basis of that court's jurisdiction was 29 U.S.C. § 655(f).

In the court below, petitioners challenged the entire standard as invalid principally for the reasons that:

> (1) Compliance with it was not economically feasible;
>
> (2) Compliance with the standard was not technologically feasible and could not be achieved within the four year period set by the standard; and
>
> (3) OSHA failed to demonstrate that the standard was reasonably necessary to protect against material impairment of health and refused even to consider whether the benefits sought to be secured from the standard were justified by the enormous cost of attempting to achieve them.

Petitioners also challenged the wage guarantee provision as beyond OSHA's statutory authority.

C. The Economic Evidence And The Decision That The Standard Is Economically Feasible

OSHA stated that the cost of complying with its cotton dust standard would be $550 million for the textile industry. There is no evidence anywhere in the record that cost of complying with the severe standard actually promulgated will be anywhere near that low.

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[18] 29 C.F.R. § 1910.1043(f)(2)(v) (App. 8-9).

Fairly summarized, the record establishes the following with respect to the economic consequences of imposing this standard. First, OSHA's economic feasibility contractor, the Research Triangle Institute (RTI), estimated that it would cost the textile industry $1.112 billion just to satisfy the exposure limit set by the standard for yarn manufacturing operations.[19] Second, Hocutt and Thomas, leading experts in the supply of dust control and related equipment estimated the capital cost of the exposure limits proposed by industry to be $250 million.[20] Third, Hocutt and Thomas calculated capital costs of $550 million for certain other assumed exposure limits which differed from those proposed by industry but which were still materially less stringent than the limit OSHA actually promulgated.[21] Finally, the industry showed that, even though compliance was not technologically feasible, the cost of attempting to comply with the standard OSHA promulgated will approach, and perhaps exceed, $2.7 billion, a sum which OSHA admits is not economically feasible.[22]

Even though OSHA promulgated more stringent, and sub-

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[19] RTI estimated capital costs of $984.4 million for a 0.2 mg/m³ limi for the operations of opening through spinning and $127.7 million for a 0.2 mg/m³ limit for the operations of twisting through warping [Ex. 6, No. 76, pp. I-15, V-28 (App. 139, 140)]. 43 Fed. Reg. 27371 (1978). The total estimate for a 0.2mg/m³ limit in yarn manufacturing is thus $1.112 billion. This does not include any cost for satisfying the limits set for slashing and weaving.

[20] Those limits were 0.5 mg/m³ for yarn manufacturing operations and 1.0 mg/m³ for slashing and weaving operations. Ex. 60, Att. 1; Ex. 62, Att. 1 (App. 154, 156).

[21] Those limits were 0.2 mg/m³ in the operations from opening through roving, 0.5 mg/m³ in spinning through warping and 1.0 mg/m³ in slashing and weaving. Ex. 60, Att. 1; Ex. 62, Att. 1 (App. 154, 156).

[22] As originally proposed, the standard would set a 0.2 mg/m³ exposure limit for all textile operations. RTI estimated this would cost $2.7 billion. In its briefs in the Court of Appeals, OSHA admitted that this was not economically feasible.

stantially more costly, exposure limits, it inexplicably used the $550 million estimate, made for a far different standard, as its estimate for the cost of its much more severe standard. No evidence linked the $550 million figure with the standard to which OSHA attached it. Nonetheless, it was this figure on which OSHA based its finding that, even though the standard would likely result in an undefined number of plant closures, it would not put the entire industry out of business. On that basis alone, OSHA concluded that the standard was economically feasible.[23]

The record also establishes that there is an equally effective, but considerably less expensive, alternative to the standard OSHA promulgated. The alternative, which would cost the textile industry in excess of $250 million, has been demonstrated to provide benefits at least as effective as those which OSHA seeks to secure from imposing the exposure limits set by the standard.[24] No matter which figure is

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[23] Industry challenged OSHA's use of the $550 million cost estimate, but the Court of Appeals sustained OSHA's decision to use this figure on the basis of a rationale expressed by OSHA's counsel in its briefs and not expressed by the agency, that the equipment Hocutt and Thomas assumed would be installed and an unspecified "little more" would achieve the stringent limits OSHA set. Slip Opinion, p. 47, n. 136. (App. 65). The court cited OSHA's brief on appeal as the only support for this critical finding. Reliance on this *post hoc* rationale is mistaken not only because it is factually erroneous but also because it is not part of the agency action under review. SEC v. Chenery Corp., 332 U.S. 194 (1947).

[24] Based on a 1970-71 study of 2000 employees in one company (the Merchant Study), OSHA predicts that its standard will result in a byssinosis prevalence rate of 12%. 43 Fed. Reg. 27355 (1978) Based on several more recent studies of more than 28,000 employees in five companies, the industry showed that its alternative likely would produce a prevalence rate of between 1% and 6%, obviously much lower than that predicted by the Merchant Study. Ex. 42, 42b, 46 and 47 (App. 157, 124, 126, 172). The industry alternative included a combination of medical surveillance, less stringent exposure limits than those set by OSHA, selective respirator use and removal from exposure as medically appropriate.

used as the cost of OSHA's standard, ($.55 billion, $1.112 billion or $2.7 billion), it exceeds tremendously the cost of the industry alternative.

The Court of Appeals held that an OSHA standard is economically feasible if it is not prohibitively expensive in the sense that it will not put an entire industry out of business and thereupon sustained this standard as economically feasible.[25] Having adopted this extreme and unprecedented definition of economic feasibility as the only limit on OSHA's power to regulate, the Court of Appeals went on to hold that OSHA is not required either to confine its standards to those it can show to be reasonably necessary or to demonstrate, even as a part of feasibility, that there exists any reasonable relation between the benefits sought to be secured from a standard and the cost of complying with it.[26]

Thereby, the Court of Appeals eliminated all of the practical limitations imposed by Sections 6(b)(5) and 3(8) of the Act, and in effect has held that so far as feasibility is concerned, OSHA may promulgate any standard it chooses so long as it concludes that its choice will not destroy an entire industry.

D. The Standard Of Review Applied By The Court Of Appeals To Sustain Economic Feasibility And The Four Year Compliance Period

Section 6(f) of the Act requires that OSHA standards are to be given finality only if they are supported by substantial evidence on the record considered as a whole.[27] The Court of Appeals paid lip service to the substantial evidence test but, in fact, sustained this standard by devising a novel and patently dangerous concept of the function of the reviewing

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[25] Slip Opinion, pp. 49-51 (App. 67-69).
[26] Slip Opinion, pp. 51-59 (App. 69-77).
[27] 29 U.S.C. § 655(f).

court. In doing so it managed to confine its responsibility to the mere determination of whether the agency had articulated adequately the basis for its actions and refused meaningfully to assess the record as a whole.[28] Thus, the Court of Appeals misapprehended or grossly misapplied the substantial evidence test, depriving petitioners of their right to judicial review.[29]

The application of this new concept of review lead to the Court's strained and unsupported findings on feasibility. By accepting at face value OSHA's determination of the cost of compliance, it erroneously adopted cost estimates which were clearly applicable only to a far less stringent standard than that imposed. By accepting at face value OSHA's conclusion that the "industry would be able to pass compliance costs on to consumers" it made a finding contrary to all the evidence on that subject. The "evidence" cited by the Court of Appeals in support of this conclusion was an *assumption* made by RTI solely for the purpose of analyzing the effect on the industry if it could pass on the cost of compliance to the consumers.[30] Significantly, the same report recognized that if costs could not be passed on:

> . . . in the absence of price increases, profit-after-taxes and ROI would be very small or negative in some cases.[31]

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[28] This approach to review has been criticized by respected authorities because it transforms the substantial evidence test from a check on the substance of agency action to a procedural hurdle which merely duplicates the requirement of an adequate statement of reasons. *See* pp. 20-25, *infra*.

[29] The misapprehension or gross misapplication of the substantial evidence test is grounds for granting a petition for a writ of certiorari. *See, e.g.*, National Labor Relations Bd. v. Baptist Hospital, Inc., 99 S.Ct. 2598 (1979).

[30] Slip Opinion, p. 49, n. 145 (App. 67); *see* Ex. 6, No. 76, pp. VI-8-VI-9, VI-39 (App. 141, 144).

[31] Ex. 6, No. 76, p. VI-37 (App. 143).

The critical and undisputed fact was that RTI simply did not attempt to determine whether costs could be passed on to the consumer. Had the Court of Appeals reviewed applicable portions of the record even in a most cursory manner, it certainly would not have elevated an analytical assumption to the status of evidence. Moreover, other evidence demonstrated that pressure from competition with cheap foreign imports and the availability of synthetic yarns as a substitute made it likely that the costs of compliance could not be passed along to consumers.[32]

The decision to sustain the four year compliance period is another strikingly clear example of how the Court of Appeals was led astray by its novel concept of its responsibility to "review" the agency's conclusions. Previous decisions in the District of Columbia Circuit had held that the agency must make a "reasoned prediction" from facts in the record that compliance is feasible within the compliance period.[33]

The simple fact is that no evidence in the record supported feasibility of the four year period. This is perhaps best illustrated by OSHA's failure to explain why it chose four years except to state that:

> [a] period of three to four years for implementation throughout industry is eminently reasonable and achievable.[34]

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[32] Ex. 6, No. 76, pp. C-35, C-48, C-52 and Tables C-20, C-25 and C-27 (App. 145-51); Tr. 2565-71 (App. 198-201); Ex. 63 (App. 188).

[33] *See, e.g.,* Industrial Union Dept. v. Hodgson, 162 U.S. App. D.C. 331, 344, 499 F.2d 467, 480 (1974); International Harvester v. Ruckelshaus, 155 U.S. App. D.C. 411, 425, 478 F.2d 615, 629 (1973).

[34] 43 Fed. Reg. 27385 (1978). Even though OSHA acknowledged that the capability of the dust control supply industry was critical to the time allowed for compliance, it ignored the only evidence from those suppliers which established that it would take *eleven* years to

The Court of Appeals upheld the four year period as a reasonable accommodation of "competing needs"[35] without even examining the evidence in the record which addressed the time required for compliance. However, OSHA has never suggested that it chose the four year period as an accommodation between competing needs.

Because it expressly declined to become familiar with basic elements of the evidence, the court sustained the critically important finding of economic feasibility on the misfitted cost estimates and upheld a period of compliance which has not a shred of evidence to support it.

REASONS FOR GRANTING THIS PETITION

This petition raises issues which are especially needful of determination by the Court in this time of ever expanding regulatory power and ever contracting economic resources with which to respond to the regulations promulgated in the exercise of that power. The petition calls upon the Court to resolve two basic conflicts between the circuits on the nature and extent of OSHA's power to affect the allocation of the economic resources of American industry. It also asks the Court to correct a novel and patently dangerous concept of the function of reviewing courts when performing the judicial function they necessarily must perform if, as intended by Congress, the courts are to serve as a check on the exercise of agency power. Finally, the petition requests the court to nullify OSHA's unauthorized attempt to guarantee wages of employees in contradiction to the expressed intent of Congress.

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manufacture enough equipment to comply even with exposure limits much less stringent than those set by the standard. Wrenn Tr. 103 (App. 195). Ex. 60, pp. 18-19 (App. 153); *see also* Hocutt Tr. 2514-15, 2488-89 (App. 196-198).

[35] Slip Opinion, p. 76 (App. 94).

1. There Is A Conflict Among The Circuits As To The Showing OSHA Must Make To Establish That Its Standards Are Economically Feasible.

It is now well-settled that OSHA must demonstrate, by substantial evidence, that compliance with the standard is economically feasible.[36] The decision in this case conflicts with decisions of the Courts of Appeals for the Fifth, Sixth and Seventh Circuits as to the meaning of the critically important term "feasible."[37]

In this case the District of Columbia Circuit interpreted the feasibility requirement of Section 6(b)(5) to mean that an OSHA standard will be sustained, as economically feasible, merely upon the agency's conclusion that the standard is not prohibitively expensive in the sense that it will not put the entire industry out of business.[38] While "the actual test for economic feasibility has yet to be fully developed,"[39] three other Courts of Appeals have held that OSHA must do much more to demonstrate economic feasibility.

In *Florida Peach Growers Assn.* v. *Dept. of Labor,* 489 F.2d 120, 130 (5th Cir. 1974), the court held that OSHA must demonstrate that the standard will not cause widespread business failure and consequent unemployment and

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[36] *See, e.g.,* American Petroleum Institute v. OSHA, 581 F.2d 493 (5th Cir. 1978) cert. granted *sub nom,* Marshall v. American Petroleum Institute, 440 U.S. 906 (1979); AFL-CIO v. Brennan, 530 F.2d 109, 121-22 (3d Cir. 1976); Industrial Union Dept. v. Hodgson, 162 U.S. App. D.C. 331, 341-42, 499 F.2d 467, 477-78 (1974). OSHA concedes that it has this obligation. Slip Opinion, p. 35 (App. 53); 43 Fed. Reg. 27361 (1978).

[37] American Petroleum Institute v. OSHA, 581 F.2d 493 (5th Cir. 1978); RMI Co. v. Secretary of Labor, 594 F.2d 566 (6th Cir. 1979); Turner Co. v. Secretary of Labor, 561 F.2d 82 (7th Cir. 1978); AFL-CIO v. Brennan, 530 F.2d 109 (3d Cir. 1975). Although RMI and Turner are enforcement cases, both courts have defined the term feasible. *See,* pp. 15-16, infra.

[38] Slip Opinion, pp. 49, 51 (App. 67, 69).

[39] Slip Opinion, p. 49 (App. 67).

held that OSHA must establish a satisfactory "... balance between the protection afforded by the requirement and the effect upon economic and market conditions in the industry." *Id.* at 132.

More recently, the Fifth Circuit invalidated a finding of economic feasibility based merely on the conclusion that the standard would not threaten the viability of the industry or the national economy. *American Petroleum Institute* v. *OSHA*, 581 F.2d 493, 503 (5th Cir. 1978). There the court held that, at least, OSHA must demonstrate a reasonable relationship between the cost of the standard and the benefits expected from it. *Id.* at 503.

The definition of economic feasibility adopted by the District of Columbia Circuit is wholly inconsistent with the decision of the Courts of Appeals for the Sixth and Seventh Circuits, both of which have defined economic feasibility to require a showing that the benefits of a standard are in proportion to its costs. Although the cases before both courts involved enforcement, rather than pre-enforcement review, of a standard, both courts were called upon to interpret the term "feasible." The Sixth Circuit held:

> But neither will controls necessarily be economically feasible merely because the employer can easily (or otherwise) afford them. In order to justify the expenditure, there must be a reasonable assurance that there will be an appreciable and corresponding improvement in working conditions... We only insist that the Secretary,... weigh the costs of compliance against the benefits expected to be achieved thereby in order to determine whether a proposed remedy is economically feasible. *RMI Co.* v. *Secretary of Labor*, 594 F.2d 566, 573 (6th Cir. 1979).

The Seventh Circuit reached a similar conclusion in *Turner*

Co. v. *Secretary of Labor,* 561 F.2d 82, 85 (7th Cir. 1977).[40]

Admittedly, these three courts differ, to some extent, as to what showing OSHA must make to prove the economic feasibility of its standards. Nonetheless, all three require OSHA to do more than merely conclude that the standard will not result in the demise of the affected industry. Thus, they conflict directly with the extreme interpretation of economic feasibility adopted in this case by the District of Columbia Circuit. This conflict is so basic to the future application of this Act that the Court should resolve it even if unconvinced that any of the four decisions correctly or fully express the proper test of economic feasibility.[41]

Wholly apart from the need to resolve the conflict, this petition should be granted to settle the important issue of what OSHA must show to prove economic feasibility. This case demonstrates the necessity for a firmer and more precise definition of this critically important term.

Neither affected industries nor the national economy can afford a rule of law which says that OSHA can promulgate a standard merely upon the conclusion that the standard alone will not destroy the affected industry. Petitioners contend that at, a minimum, OSHA must:

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[40] *But see,* American Iron and Steel Institute v. OSHA, 577 F.2d 825 (3d Cir. 1978) (affirming the coke oven emissions standard), petitions for cert. pending, Nos. 78-918, 78-919. Even the Third Circuit has required that, at a minimum, OSHA must establish the extent to which the standard would force companies in the industry out of business and must evaluate the effect of the standard on the industry structure and the ability of the industry to meet its competition. AFL-CIO v. Brennan, 530 F.2d 123 (3d Cir. 1975).

[41] Petitioners respectfully suggest below what they believe to be a reasonable test which will permit OSHA to fulfill the objectives of the Act within the limits imposed by Congress and without jeopardizing the future of industry.

(i) base its economic analysis on a reasonably accurate estimate of the cost to comply with the standard it promulgates;

(ii) show by reliable evidence—not by assumptions—that industry can either absorb the expected compliance costs or pass these costs on to consumers;

(iii) demonstrate the extent to which its standard will force business failure especially where, as here, OSHA admits that the standard will force an undefined number of companies out of business and show that the standard will not affect adversely the structure of the industry or its ability to meet its competition; and

(iv) demonstrate that there exists a reasonable relationship between the cost of its standard and the benefits it is expected to yield especially where, as here, there is available an equally effective but materially less expensive, alternative.

These elements are practical and reasonable criteria of feasibility by any definition of the term. It is essential, in a time of expanding and expensive regulation, that OSHA be required to do more than conclude that a standard will not put an entire industry out of business. There must be realistic criteria to guide OSHA and the Courts of Appeals in the allocation of the limited, and ever contracting, resources of industry. This issue is of critical importance in this case to the textile industry. It is equally important to the national economy. Petitioners respectfully ask the Court to settle it.

In fact, the Court's previous decisions appear to require the interpretation suggested by petitioners if the Act is to remain as a constitutionally permissible delegation of legislative authority. *National Cable Television Assn.* v. *United* States, 415 U.S. 336, 342 (1974).

Congress inserted the feasibility requirement in Section 6(b)(5) as a criterion for setting standards. Senator Javits,

who authored the amendment inserting the feasibility requirement, explained:

> As a result of this amendment the Secretary, in setting standards, is expressly required to consider feasibility of proposed standards. This is an improvement over the Daniels bill, which might be interpreted to require absolute health and safety in all cases, regardless of feasibility, and the Administration bill, which contains no criteria for standards at all.[42]

The District of Columbia Circuit has announced the rule that a standard is feasible if it will not put an entire industry out of business.[43] This interpretation makes meaningless the criteria set by Section 6(b)(5) and confers on OSHA unlimited legislative power to regulate the national economy.

For instance, this interpretation leaves OSHA free to establish the criteria by which it will judge whether an industry will survive its regulation. Also, it allows OSHA to decide, without any criteria whatsoever, whether the failure of one or two companies in an industry comprised of four companies (like the automobile industry) will or will not be an acceptable sacrifice in pursuit of OSHA's goals. Likewise, in a multi-company industry (like the textile industry), OSHA is empowered to decide whether 10 or 100 or 1,000 business failures are acceptable. Indeed, so long as OSHA leaves one company in business, it can satisfy the test adopted by the District of Columbia Circuit.[44]

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[42] S. Rep. No. 91-1282, 91st Cong., 2d Sess., at 58; Legis. Hist. at 197. We assume, without admitting, that the term feasible is an adequate standard for the exercise of the delegated legislative power.

[43] Slip Opinion, pp. 49-51 (App. 67-69).

[44] Until the Court effectively resolves the conflicts between the District of Columbia Circuit and other circuits as to the issues in this case, the outcome of judicial review will depend more on fleetness of foot in the race to the courthouse under 28 U.S.C. § 2112 than on the merits of the case as measured by a uniform rule of law. For example, in this case, petitions for review were filed in the Fourth, Fifth, Sixth, Seventh and District of Columbia Circuits.

The consequence of this rule is staggering when one remembers that OSHA is empowered to set standards for virtually every industry in the nation. Under this rule OSHA is empowered to decide, industry by industry, the ultimate structure and configuration of each industry subject to the Act so long as OSHA concludes that any one standard will not end the existence of the industry. It was precisely this unfettered discretion to restructure the entire economy that made it necessary for the Court to strike the statute as unconstitutional in *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935) and *Panama Refining Co.* v. *Ryan,* 293 U.S. 388 (1935).

As interpreted by the District of Columbia Circuit, Section 6(b)(5) is an unconstitutional delegation of legislative power. Perhaps a more narrow interpretation of the statute, such as that here suggested by petitioners, will avoid the constitutional problems. However, if the District of Columbia Circuit's interpretation is correct, petitioners submit that the unconfined delegation to OSHA in the Act must be stricken as unconstitutional.

2. There Is A Conflict Between The Circuits As To Whether OSHA Must Demonstrate The Existence Of A Reasonable Relation Between The Costs Of A Standard And The Benefits Expected From It And As To Whether OSHA Must Demonstrate A Reasonable Necessity For The Standard.

Petitioners argued below that, under the Act construed as a cohesive whole and particularly because of Sections 3(8) and 6(b)(5), OSHA must demonstrate that its standard is reasonably necessary and must establish the existence of a reasonable relationship between the cost of a standard and the benefits expected from it. OSHA admittedly did not make

those showings here and, in fact, denied that it was obligated to do so.[45]

Confronted with an almost identical situation in *American Petroleum,* the Fifth Circuit set aside the benezene standard because, *inter alia,* OSHA failed to show that its standard was reasonably necessary or to establish "whether the benefits expected from the standard bear a reasonable relationship to the costs imposed by the standard."[46]

The District of Columbia Circuit explicitly rejected the Fifth Circuit's decision in *American Petroleum* and held that OSHA is not required to prove reasonable necessity or to make a ". . . determination that the costs of a standard bear a 'reasonable' relationship to its benefits."[47] This creates a clear conflict between these two circuits on a critical issue inherent in the agency rulemaking process. Petitioners respectfully submit that the conflict should be resolved in favor of the interpretation of the Fifth Circuit.

3. This Case Presents The Important Question Of The Proper Role Of The Reviewing Court Under The Substantial Evidence Standard Of Review.

It is clear that OSHA's standards are valid only if supported by substantial evidence "in the record considered as a whole."[48] In *Universal Camera Corp.* v. *N.L.R.B.,* 340 U.S. 474 (1951), the Court held that, when reviewing agency actions under the substantial evidence test, courts

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[45] OSHA takes the view that it need only find that the expected benefits are likely to be "appreciable." 43 Fed. Reg. 27379 (1978).

[46] 581 F.2d 493, 503 (5th Cir. 1978), cert. granted *sub nom* Marshall v. American Petroleum Institute, 440 U.S. 906 (1979), argued orally on October 10, 1979. *See also,* Florida Peach Growers Assn. v. Dept. of Labor, 489 F.2d 120, 130 (5th Cir. 1974).

[47] Slip Opinion, p. 56 (App. 74). This conflict may be resolved by the Court's decision in American Petroleum.

[48] 29 U.S.C. § 655(f).

should guard against abdication of "the conventional judicial function."[49] Thereupon, it charged them with the duty to review and analyze the evidence and to determine whether the evidence on which the agency acted was substantial when considered in perspective of other evidence which fairly detracts from the evidence on which the agency relied.[50]

The substantial evidence test is considered generally to require that the reviewing court review and analyze the substance of agency action even in complex evidentiary matters, including questions of technology and economics.[51] This is especially important in applying the substantial evidence test as defined by *Universal Camera* because, only by analyzing the relevant evidence, can the reviewing court determine whether the evidence on which the agency relied is substantial when considered in view of the detracting force of other evidence.

However, in this case, the District of Columbia Circuit defined its role in very different and much more limited terms, taking the novel view that the reviewing court should remain detached and apart from the evidence, especially where it concerns questions of technology and economics. The decision below cited the applicable precedent defining

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[49] 340 U.S. at 490.

[50] 340 U.S. at 490, 487-88. This does not mean that the Court must in the traditional sense weigh the evidence, but as will be shown below it requires the court to analyze and evaluate the force of technical and economic evidence.

[51] Universal Camera Corp. v. N.L.R.B., *supra; See also,* Ethyl Corp. v. EPA, 176 U.S. App. D.C. 373, 541 F.2d 1, 67 (1976); International Harvester v. Ruckelshaus, 55 U.S. App. D.C. 411, 478 F.2d 615 (D.C. Cir. 1973); Portland Cement Assoc v. Ruckelshaus, 158 U.S. App. D.C. 308, 486 F.2d 375 (1973); Greater Boston Television Corp. v. FCC, 143 U.S. App. D.C. 383, 444 F.2d 841 (1970), cert. denied 403 U.S. 923 (1971); American Iron & Steel Institute v. OSHA, 577 F.2d 825 (3d Cir. 1978); Associated Industries v. Dept. of Labor, 487 F.2d 342 (2d Cir. 1973). *See generally,* Jaffe, Judicial Control of Administrative Action, pp. 600-613 (1965).

the substantial evidence test.[52] However, it defined in very narrow terms the court's role in reviewing OSHA's technological and economic determinations:

> From their stance outside of both scientific and political debates, *courts can help to ensure that decisionmakers articulate the basis for their decisions.* But once courts step beyond that role and endeavor to judge the merits of competing expert views, they leave the terrain they know. Slip Opinion, p. 27, n. 66 (emphasis added). [Citing *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 67 (D.C. Cir. 1976) (Bazelon, C.J., and McGowan, J., concurring); *Internat'l Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615, 652 (D.C. Cir. 1973) (Bazelon, C.J., concurring in result)].

A respected commentator on administrative law has termed this uncritical substantive review, which has been developed in several concurring opinions of Judge Bazelon, as the "Bazelon heterodoxy" and has condemned it as legally inadequate. Davis, Administrative Law Treatise, § 6:36, p. 607 (2d Ed. 1978).[53] This criticism is also reflected in the decision in *Ethyl Corp.* v. *EPA*, 541 F.2d 1, 68-69 (D.C. Cir. 1976) wherein Judge Leventhal observed in a concurring opinion:

> Taking [Judge Bazelon's] opinion in its fair implication, as a signal to judges to abstain from any substantive review, it is my view that while giving up is the easier course, it is not legitimately open to us at present.
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> . . . Better no judicial review at all than a charade that gives the imprimatur without the substance of judicial confirmation that the agency is not acting unreasonably.

[52] Slip Opinion, pp. 20-28 (App. 38-46).

[53] In fact, under the Bazelon heterodoxy, the court is not required to analyze technical or economical evidence at all. Ethyl Corp. v. EPA, 541 F.2d 1, 67 (D.C. Cir. 1976), concurring opinion of Bazelon, C.J.

> Once the presumption of regularity in agency action is challenged with a factual submission, and even to determine whether such a challenge has been made, the agency's record and reasoning has to be looked at. If there is some factual support for the challenge, there must be either evidence or judicial notice available explicating the agency's result, or a remand to supply the gap. 541 F.2d 1 at 68, 69 (Leventhal, J., concurring).

The District of Columbia Circuit now has subscribed to the Bazelon heterodoxy as the proper measure of judicial review to be accorded this standard and indeed all subsequent OSHA standards. Consequently, when called upon to review OSHA's technical and economic findings, the District of Columbia Circuit confined its responsibility to a determination of whether the agency adequately *articulated* reasons for its findings.

This case demonstrates that such restricted judicial review is wholly inadequate. For instance, because the court refused to analyze the economic evidence, it sustained the finding of economic feasibility on the basis of an assumption and sanctioned an economic analysis made on a cost estimate that did not reflect the cost of the standard. Likewise, the court sustained the four year compliance period without even considering the evidence addressed to that issue.[54]

These examples show that by too narrowly defining its role the court sustained the agency's findings on two critical issues when there was actually *no evidentiary support* for OSHA's findings. This is because the cosmetic test adopted by the District of Columbia Circuit required OSHA to articulate, but not to support, its findings. These examples also show that the test applied in this case rendered illusory peti-

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[54] *See*, pp. 12-13, *supra*.

tioners' entitlement to exacting judicial review of standards which strike at the heart of their economic future.

The task of proper review may be difficult and demanding but, unless the reviewing court examines and analyzes the evidence to which its attention is called, the entire regulatory system becomes a charade in which evidence is placed in the record only to be ignored and public participation in rulemaking is made meaningless.[55]

The adoption of such a restricted standard of judicial review by the District of Columbia Circuit has great practical significance for it places a cloud over the future application of the substantial evidence test in all administrative law cases.[56] This is especially true because the unorthodox rule was adopted by the District of Columbia Circuit, the court which reviews more administrative agency actions than the rest of the Courts of Appeals combined.

Petitioners submit that the reviewing court does not necessarily have to comb the entire record compiled in the rulemaking process, but it should be required to examine and analyze the conflicting technical and economic evidence brought to its attention by the parties on appeal, and it must determine whether the evidence which the agency cites as support for its actions is, in fact, substantial when considered in perspective of other evidence which fairly detracts from that cited by the agency. Likewise, petitioners submit that

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[55] Indeed, petitioners' right to review is of constitutional proportions. The Court has indicated numerous times that Congress could not totally preclude judicial review consistently with due process. Crowell v. Benson, 285 U.S. 23, 47 (1932); Yakus v. United States, 321 U.S. 414 (1944); *See* Hart & Wechsler, Federal Courts 2d Ed. pp. 339-40 (1973). The illusory review below was in essence a denial of review in violation of petitioners' due process rights under the Fifth Amendment.

[56] Of course, it affected adversely the outcome of this case which is one of critical importance to the entire textile industry.

the reviewing court is obligated to discern whether the "evidence" cited by the agency is, in fact, reliable evidence—not just assumptions or unsupported opinions. It is beyond question that in evaluating evidence the courts have expertise far superior to that of administrative agencies.

In sum, when Congress required that OSHA standards be reviewed under the substantial evidence test it obligated the Courts of Appeals to accept their proper role in implementing that test. Constitutionally adequate judicial review under the standard set by Congress leaves no room for escape from the necessity to review technical and economic evidence. Consequently, due process is satisfied only when the reviewing court accepts this responsibility. The District of Columbia Circuit failed to provide the kind of review to which petitioners are entitled and thereby deprived them of due process of law.

4. The Wage Guarantee Provision Exceeds OSHA's Statutory Authority.

The standard provides that when a physician determines that an employee is unable to wear a respirator the employee shall be given the opportunity to transfer to another position and that:

> The employer shall assure an employee who is transferred *due to an inability to wear a respirator suffers no loss of earnings or other employment rights or benefits* as a result of the transfer. 43 Fed. Reg. 27396 ¶ (f)(2)(v) (emphasis added).

OSHA explained that:

> . . . [T]he goal of this provision is to minimize any ad-

> verse economic impact on the employee by virtue of the inability to wear a respirator.[57]

OSHA's notions of economic fairness resulted in a rule which would require employers to guarantee the wages of these employees without any finding of actual health impairment and even if the inability to wear a respirator were wholly unrelated to cotton dust exposure. Petitioners respectfully submit that OSHA simply does not have the authority under the Act to impose wage guarantees, particularly when the goal of such provisions is economic rather than health related.

No one contends that the Act expressly confers upon OSHA the authority to regulate wages or other employment benefits. As OSHA concedes:

> It is true that the . . . Act contains no language which either explicitly requires or expressly authorizes the inclusion of [wage guarantee provisions] in OSHA health standards. 43 Fed. Reg. 52976 (1978).

This alone should be determinative, for when Congress has

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[57] 43 Fed. Reg. 27387 (1978). OSHA also stated:

> It is manifestly unfair that employees who are unable to wear respirators suffer loss of jobs or other *economic detriment* because their employers have not yet achieved compliance with the engineering control requirements of the standard, but are relying instead on the interim and less effective device of respirators. During the multi-year period prior to the full implementation of engineering controls, this risk of *adverse economic impact* on employees is a real one. Accordingly, we conclude that where the employer is relying upon respirators as the means of limiting worker exposure, his or her compliance obligation must include the obligation to assure that employees who are unable to wear respirators not suffer any *economic detriment. Id.* [Emphasis added].

intended to give to an agency authority to regulate wages and other benefits, it has done so in explicit terms.[58]

The court below held that OSHA has implied authority to guarantee wages. It found the authority in Section 3(8), which it construed as impliedly authorizing OSHA to regulate wages and other benefits.[59]

This interpretation of the Act is fundamentally at odds with the expressed intent of Congress to withhold from OSHA authority to regulate pay or other benefits. *Whirlpool Corp.* v. *Marshall,* 48 U.S.L.W. 4189 (February 26, 1980) addressed this point authoritatively:

> It is also important to emphasize that what primarily troubled Congress about the Daniels bill's 'strike with pay' provision was its requirement that employees be paid their regular salary after having properly invoked their right to refuse to work under the section. It is instructive that virtually every time the issue of an employee's right to absent himself from hazardous work was discussed in the legislative debates, it was in the context of the employee's right to continue to receive his usual compensation.

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[58] For example, the Federal Coal Mine Health and Safety Act of 1969, as amended by the Federal Mine Safety and Health Amendments Act of 1977, authorizes miners to elect to transfer jobs for specified health reasons and specifically provides that: "[a]ny miner so transferred shall receive compensation for such work at not less than the regular rate of pay received by him immediately prior to his transfer." 30 U.S.C. § 843(b)(3). Similarly, the Clean Air Act Amendments of 1977 include an explicit mandate for employee earnings protection. *See* 42 U.S.C. § 7410(a)(6).

[59] Slip Opinion, pp. 77-80 (App. 95-98). The Court of Appeals ignored OSHA's statement that the goal of the provision was economic fairness and constructed a health nexus for the provision by adopting the *post hoc* rationale of OSHA's counsel that the possibility of a disadvantageous transfer "may" cause the employee to refrain from disclosing health impairment. Slip Opinion, p. 79. (App. 97). In any event, this rationale is inadequate since it is inability to wear a respirator, *not* health impairment that triggers the wage guarantee provision. 29 C.F.R. § 1910.1043(f)(2)(v) (App. 8-9).

> When it rejected the 'strike with pay' concept, therefore, Congress very clearly meant to reject a law unconditionally imposing upon employers an obligation to continue to pay their employees their regular pay checks when they absented themselves from work for reasons of safety. 48 U.S.L.W. at 4193-94 (footnotes omitted).

Thus, *Whirlpool* is dispositive of OSHA's contention that Congress intended to confer on it authority to impose wage guarantees on employers.[60] The wage guarantee provision in this standard unconditionally imposes on employers the obligation to continue unchanged an employee's wages and other benefits when the employee cannot wear a respirator and thus transfers to a job requiring lesser skills and warranting lesser wages. Clearly, if Congress refused explicitly to authorize continued pay even where the employee absented himself from work for reasons of safety, it cannot be said impliedly to have authorized continued pay merely because the employee cannot wear a respirator.

The intent of Congress not to give OSHA authority to order wage guarantees is further expressed in Section 4(b)(4) of the Act:

> Nothing in this Chapter shall be construed *to supersede or in any manner affect any workmen's compensation law* or to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death of employees arising out of, or in the court of, employment. 29 U.S.C. § 653(b)(4) [emphasis added].

The wage guarantee provision requires employers to pay a

[60] Whirlpool is especially applicable to the present case because the rejected "strike with pay" provision discussed in Whirlpool would have guaranteed wages of employees who absented themselves from exposure to potentially toxic substances. 48 U.S.L.W. at 4192, n. 20.

transferred employee one hundred percent of his pre-transfer wages and other benefits. If, as petitioners believe, there is no nexus between material impairment of health and the wage guarantee provision, that provision is clearly unauthorized. If, as the court below held, such a nexus does exist, then the wage guarantee provision has a direct and severe effect on state workmen's compensation laws and thereby contradicts the intent of Congress expressed in Section 4(b)(4) of the Act.

Thus, Section 4(b)(4) of the Act underscores the clear message given by Congress' rejection of the "strike with pay" provision. Congress did not either expressly or impliedly authorize OSHA to promulgate the wage guarantee provision. It is vital that the Court set aside the provision and thereby enforce the limits on OSHA's delegated power.

CONCLUSION

For all the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

AMERICAN TEXTILE
MANUFACTURERS
INSTITUTE, INC.

By: /s/ ROBERT H. BORK

ROBERT H. BORK
142 Huntington Street
New Haven, Connecticut 06511
(203) 624-6027

By: /s/ GREGORY B. TOBIN

GREGORY B. TOBIN
Ogletree, Deakins, Smoak,
Stewart & Edwards
3920 First National Bank Tower
Atlanta, GA 30303
(404) 588-1300

By: /s/ JOHN S. BATTLE, JR.

JOHN S. BATTLE, JR.
ROBERT E. PAYNE
THOMAS W. MCCANDLISH
McGuire, Woods & Battle
1400 Ross Building
Richmond, VA 23219
(804) 644-4131

MILLIKEN AND COMPANY

By: /s/ ROBERT T. THOMPSON

ROBERT T. THOMPSON
GARY S. KLEIN
Thompson, Mann & Hutson
The Daniel Building-Suite 2222
Greenville, S. C. 29602
(803) 242-3200

ARKWRIGHT MILLS

By: /s/ THOMAS A. EVINS

THOMAS A. EVINS
CLYDE H. HAMILTON
Butler, Means, Evins & Browne
P. O. Box 451
Spartanburg, S. C. 29304
(803) 582-5630

SPARTAN MILLS

By: /s/ JOSEPH K. MADDOX, JR.

JOSEPH K. MADDOX, JR.
P. O. Box 5784
Spartanburg, S. C. 29304
(803) 574-0211

BLAIR MILLS, INC.

By: /s/ ROBERT T. THOMPSON

ROBERT T. THOMPSON
GARY S. KLEIN
Thompson, Mann & Hutson
The Daniel Building-Suite 2222
Greenville, S. C. 29602
(803) 242-3200

HERMITAGE, INC.

By: /s/ ROBERT T. THOMPSON

ROBERT T. THOMPSON
GARY S. KLEIN
Thompson, Mann & Hutson
The Daniel Building
Suite 2222
Greenville, S. C. 29602
(803) 242-3200

DAN RIVER, INC.

By: /s/ ROGER L. TUTTLE

ROGER L. TUTTLE
2291 Memorial Drive
Danville, VA 24541
(804) 799-7121

CONE MILLS CORPORATION

By: /s/ SAMUEL K. ABRAMS

SAMUEL K. ABRAMS
BRIAN E. MORAN
Baker & Hostetler
1776 K Street, N.W.
Suite 900
Washington, D. C. 20006
(202) 293-6260

H. J. ELAM, III
NEIL W. KOONCE
Cone Mills Corporation
1201 Maple Street
Greensboro, N. C. 27405
(919) 279-6567

MAYFAIR MILLS

By: /s/ THOMAS A. EVINS

THOMAS A. EVINS
CLYDE H. HAMILTON
Butler, Means, Evins & Browne
P. O. Box 451
Spartanburg, S. C. 29304
(803) 582-5630

SPRINGS MILLS, INC.

By: /s/ DAN M. BYRD, JR.

DAN M. BYRD, JR.
J. SPRATT WHITE
P. O. Box 70
Fort Mill, S. C. 29715
(803) 547-2901

RIEGEL TEXTILE CORPORATION

By: /s/ FRED M. RICHARDSON

FRED M. RICHARDSON
LOVIC A. BROOKS, JR.
CHARLES A. EDWARDS
Constangy, Brooks & Smith
1900 Peachtree Center Building
230 Peachtree Street, N.W.
Atlanta, GA 30303
(404) 525-8622

FIELDCREST MILLS, INC.

By: /s/ JOHN S. BATTLE, JR.

JOHN S. BATTLE, JR.
ROBERT E. PAYNE
THOMAS W. MCCANDLISH
McGuire, Woods & Battle
1400 Ross Building
Richmond, VA 23219
(804) 644-4131

WEST POINT-PEPPERELL, INC.

By: /s/ RICHARD H. MONK, JR.

RICHARD H. MONK, JR.
C. POWERS DORSETT
West Point-Pepperell, Inc.
P. O. Box 71
West Point, GA 31833
(205) 756-7111

CERTIFICATE OF SERVICE

The undersigned, who certifies that he is a member of the bar of this Court, hereby certifies that on this 14th day of March, 1980, a copy of the foregoing Petition for a Writ of Certiorari filed by the American Textile Manufacturers Institute, Inc., Milliken & Company, Arkwright Mills, Spartan Mills, Blair Mills, Inc., Hermitage, Inc., Dan River, Inc., Cone Mills Corporation, Mayfair Mills, Springs Mills, Inc., Riegel Textile Corporation, Fieldcrest Mills, Inc. and West Point-Pepperell, Inc. was mailed, postage prepaid, to each of the following persons at the addresses indicated below:

Charles M. Crump, Esq.
Apperson, Crump, Duzane & Maxwell
2610-100 North Main Building
Memphis, Tennessee 38103

Carl W. Vogt, Esq.
Fulbright & Jaworski
1150 Connecticut Avenue, N.W.
Washington, D. C. 20036

Neal P. Gillen, Esq.
1701 L Street, N.W., Suite 460
Washington, D. C. 20036

J. Albert Woll, Esq.
815 Sixteenth Street, N.W.
Washington, D. C. 20006

George H. Cohen, Esq.
Jeremiah A. Collins, Esq.
Bredhoff, Gottesman, Cohen & Weinberg
1000 Connecticut Avenue, N.W.
Washington, D. C. 20036

Arthur M. Goldberg, Esq.
15 Union Square
New York, New York 10003

John A. Bryson, Esq.
Allen H. Feldman, Esq.
United States Department of Labor
Room S4004
200 Constitution Avenue, N.W.
Washington, D. C. 20210

Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D. C. 20530

By /s/ ROBERT E. PAYNE